been prepared by or on the part of the defender. But unfortunately for the pursuer the meaning appears to me to be made plain by the way in which this word is construed on the record. The pursuer does not say that "waive" only meant to put aside for a time; what he says is that the things to be abandoned or discharged were not at all alleged claims against the defender, but only those which were specified at the communings between the parties. Thus, on his own showing "waive" was not the putting aside for a time, but meant that the things to be waived were to be abandoned.

The pursuer's next point is that the things to be waived being only alleged claims, this means that the claims specified in the communings were all that were discharged. This, I think, is not really the case upon the true construction of the word used. That word appears to me to be not equivalent to "specified," but the equivalent of "not admitted;" that is to say, the claims waived were claims made or alleged by the pursuer, but were claims which were not admitted by the defender.

On the last question, that of alleged error on the part of the pursuer, I think the judgment of the Court must also be against the pursuer. Be it that the pursuer was in error, still it is not suggested that this was induced by fraud or misrepresentation on the part of the defender, and error influencing one party is not a ground on which an instrument like this discharge can be invalidated.

The result is that in my opinion the pursuer's appeal ought to be dismissed; but I feel it right to add that it is to be regretted this discharge was taken from the pursuer for the consideration which it expressed, and the defender having achieved success on the defence which has been sustained will do more in his own interest as an employer of labour should he, there being no imputation on his honesty or fair dealing, receiving back the £6, 10s., waive even this plea.

Lord Rutherfurd Clark—The important question here is that under section 38 of the Conveyancing Act, and I confess that it is to me a difficult and doubtful point which I am glad to be relieved of the obligation of having to decide by the provisions of the following section, for however much the question may be doubtful under section 38 whether this document has been founded on in Court, there is no doubt that looking to the evidence here it is a probative document under section 39. That being so, I confess it removes all my difficulty, for I can see no difficulty whatever in pronouncing as to the meaning of the document. It is clear in the first place that it is a discharge of all claims, and in the next place I see no possible ground on which it should not receive its full and plain effect. I am therefore of opinion that the Sheriff's judgment should be affirmed.

Lord Young was absent.

The Court found "that in granting the document founded on by the defender, the pursuer discharged the defender of all claims on account of the death of his son;" "that the document was valid and probative in law;" therefore dismissed the appeal.

Counsel for Pursuer (Appellant)—Campbell Smith—Rhind. Agent—William Officer, S.S.C.
Counsel for Defender (Respondent)—Darling. Agents—H. B. & F. J. Dewar, W.S.

Thursday, February 8.

SECOND DIVISION.

[Lord M'Laren, Ordinary.

DRYER AND OTHERS *v.* BIRRELL AND OTHERS.

Marine Insurance — Warranty—"No St Lawrence"—Construction of Warranty.

A ship was insured under a time policy which contained the warranty "No St Lawrence between 1st October and 1st April." Between these dates she called at ports within the Gulf, but not within the River St Lawrence, and she was subsequently lost within the period for which the policy was current. *Held*, on a proof, (*rev.* judgment of Lord M'Laren) that there was no general understanding of merchants by which the warranty applied to both the River and the Gulf; that it was therefore ambiguous, and must be strictly construed against the underwriters who founded on it; and that they were therefore not freed by the ship having been within the Gulf during the specified period from their obligation to indemnify the shipowner. Lord Craighill *dissented*, on the ground that the words "No St Lawrence" were not ambiguous, and applied to both River and Gulf.

This was an action raised by H. B. Dryer, merchant, St John's, Newfoundland, and others, owners of the barque "L. de V. Chipman," against Walter Birrell and others, the underwriters with whom the ship had been insured under a time policy of insurance in which she was valued at £3000. The pursuers concluded against the defenders for their several proportions of the sum of £3396, 15s. 10d., being the amount of average loss and total loss under the said policy. The vessel was insured from and during the space of twelve calendar months, commencing on the 29th May 1878 and ending on the 28th May 1879, both days inclusive, as employment might offer, in port and at sea, in docks and on ways, at all times, in all places, and on all lawful trades and services whatsoever. On the margin of the policy there was written the following warranty, viz:—"Warranted no St Lawrence between 1st October and 1st April." The "Chipman" during the period for which she was insured carried a cargo of iron from Cardiff, in Wales, from which she sailed in September, to Charlottetown, Prince Edward's Island, in the Gulf of St Lawrence; after discharging this cargo she loaded at Souris, Prince Edward's Island, also a port in the Gulf of St Lawrence, a cargo of oats and deals, with which she sailed on 14th December 1878 for Queenstown or Falmouth in the United Kingdom for orders. During this voyage she was totally lost by perils of the sea in the open Atlantic on 11th January 1879.

The pursuers averred—"By long established custom the warranty expressed in said policy, 'Warranted no St Lawrence between 1st October and 1st April,' has been and is understood among underwriters and owners of vessels insuring the same to mean that the vessel insured shall not during the period specified be sent to or be in the river St Lawrence. The said warranty is, and has been for a very long period, so understood by underwriters and owners of vessels insuring the

same in Glasgow, Liverpool, and other ports in the United Kingdom, as well as by those in St John's, in the island of Newfoundland, which forms the north-east side of the main entrance to the Gulf of St Lawrence. It was on the understanding foresaid that the policy in question was entered into. The said vessel was not in the river St Lawrence during the period mentioned in said warranty."

The defenders denied liability, on the ground that the vessel having been in the Gulf of St Lawrence between 1st October and 1st April, there was a breach of warranty liberating them from their obligation of indemnity. They averred as follows:—"It has long been customary in time policies of insurance to insert a warranty providing that the vessel shall not during the winter months visit certain parts of the globe which are specially dangerous for navigation at that season. In particular, it has been a long established custom to stipulate in time policies that the vessel insured shall not enter or be in the river and Gulf of St Lawrence between 1st October and 1st April. Sometimes the exclusion is from the river alone; and the usual form of warranty in such cases is 'Warranted no river St Lawrence' between the dates specified. In the present case the exclusion was intended to be applied to both Gulf and river St Lawrence; and accordingly the words 'Warranted no St Lawrence between 1st October and 1st April' were used. The said clause of warranty was not framed by the defenders' but by the pursuers' brokers, who prepared the original covering slip and the policy which followed upon it. By the said warranty it was stipulated and agreed between the parties to the insurance contract that the vessel insured should not within the period specified enter or be in either the river or Gulf of St Lawrence. The terms of the said warranty are distinct and unambiguous; but in the event of its being held competent to interpret them by proof of a custom or understanding of trade, the defenders aver that the construction above set forth is the true construction of the said clause, according to the custom and understanding of underwriters and shipowners, and at all events according to the custom and understanding of underwriters and shipowners in Glasgow, where the policy in question was entered into." "The geographical limits of the Gulf of St Lawrence are distinctly marked. . . . . The navigation of the Gulf of St Lawrence, and of the approaches to it in the Atlantic Ocean, is in many respects dangerous and difficult, and it is especially so in the winter months, on account of the fogs which prevail. The principal shipments from Prince Edward's Island, which is situated in the Gulf of St Lawrence, consist of grain; and vessels with grain cargoes sailing from that port in the winter months are uniformly considered by underwriters as extra hazardous risks. . . . . The rate of premium charged on the policy founded on for a twelve months' policy was ten guineas per cent., and was greatly less than the usual premium for such a policy where liberty is given to the vessel to enter the lower ports on the Gulf of St Lawrence, which include the ports of Prince Edward's Island, during the winter; and it is the usual premium charged where both the river and Gulf of St Lawrence are excluded."

The pursuers pleaded—"(1) The pursuers having committed no breach of said warranty, the defenders are not entitled to withhold payment of the sums due by them under said policy."

The defenders pleaded—"(3) The policy having been rendered null and void by the pursuers' breach of warranty, the defenders are entitled to absolvitor."

The case originally depended before Lord Craighill. He allowed a proof, which was partly taken abroad on commission and partly before the Lord Ordinary (M'Laren), before whom the action afterwards came to depend. It related to the understanding among brokers and shipowners as to the meaning of the expression "No St Lawrence" and similar expressions occurring in policies of marine insurance. The evidence, which is summarised in the opinions of the Judges, showed that the expression "No St Lawrence" was understood by a number of the witnesses (who were merchants, brokers, underwriters, and others acquainted with shipping) to mean both the Gulf and river St Lawrence. A number, however, deponed that it referred, as they understood it, to the river only, and not the Gulf. In the Inner House it was held that the general usage contended for by the defenders was not proved.

The Lord Ordinary (M'Laren) on 4th August 1882 found "that the ship 'L. de V. Chipman' was in the Gulf of St Lawrence between 1st October and 1st April, during the period intended to be covered by the policy of insurance sued on, and that in breach of the warranty indorsed thereon, which the Lord Ordinary finds to be a warranty against the navigation of the river and Gulf of St Lawrence during the prescribed period; therefore assoilzies the defenders from the several conclusions directed against them respectively, and decerns.

"*Note.*— . . . . The parties are therefore at issue as to the meaning of the words 'No St Lawrence' in the clause of warranty. Lord Craighill, before whom the case originally came to depend, on 28th May 1880 allowed the parties a proof of their respective averments. Under this order evidence was taken on commission at London and Liverpool, and under another commission at St John's, Newfoundland, as to the usage and understanding of the mercantile profession with reference to clauses restricting the period of navigation of the waters of the St Lawrence. This evidence has been supplemented by a parole proof before myself.

"At the commencement of the proof before me exception was taken by one of the parties to the admission of parole evidence of the meaning of the words 'No St Lawrence,' on the ground that no such evidence could be admitted to qualify the meaning of a written instrument. I consider that the ascertainment of the limits and extent of the geographical expression 'St Lawrence' was a proper subject of extrinsic evidence, and for this reason, and because there was really no other subject to which the proof allowed by Lord Craighill could be usefully directed, I admitted the evidence *quantum valeat.*

"In view of the apparent conflict of evidence on this subject, I was invited by both parties to avail myself of such aid as might be derived from certain presumptions which they conceived to be applicable to the construction of the policy of insurance. Counsel for the pursuers (the owners of

the ship) contended, on the authority of a recent case relating to the contract of life assurance, that the language of the clause of the warranty ought to be construed in accordance with precedent, *fortius contra proferentem*. In the case referred to the question was whether a warranty of the truth of the representations or answers returned by the assured meant a warranty of their absolute truth, or only of their truth in the knowledge and belief of the assured. It was thought that the former construction would be most unreasonable, because an assured could not be expected to guarantee the absolute truth of statements regarding his own medical history, but only to give such assurances on the subject as a person not professionally instructed could give regarding his case. The warranty was therefore construed against the contention of the Assurance Company (who framed it), and in a sense least burdensome to the assured.

"The present case, however, does not raise any question as to the obligatory force of the clause of warranty. The question is not one of degree, but of identification. The clause is of usual, or, as I am informed, almost universal, occurrence in time policies. In the present case the breach of warranty alleged is the being in the Gulf of St Lawrence after the 1st of October; but in the next case of casualty the objection may be that the ship was in the river St Lawrence after that date—for example, on her outward voyage. Supposing such a case to be set down for trial along with the present case, it would be necessary (according to the principle of construction contended for) to give different meanings to the term St Lawrence in the two cases, in order that in each case a construction should be adopted which should be the least favourable to the case of the underwriters. I only suggest such a case to illustrate the difficulty of extending a rule primarily applicable to the interpretetion of general words to questions of specific identity.

"For the defenders (the underwriters) it was contended that the words 'St Lawrence,' being used without limitation, must be presumed to apply to all waters bearing that name, unless the contrary be clearly established. I think it was suggested that 'No St Lawrence' is a universal negative proposition, excluding all waters of that name or genus. But it is in evidence that policies are not infrequently endorsed 'No Baltic,' and 'No British North America,' where the defenders' construction is plainly inadmissible. It is evident when the ellipsis is supplied that the subject of the universal negative is not the term 'St Lawrence,' but 'navigation' or some equivalent term, and that St Lawrence is not a universal but a specific term. The true reading is 'No navigation in the waters named St Lawrence,' and I think I must endeavour, without the aid of presumptions, but with the benefit of such information as was available to the parties to this contract of insurance, and to the shipowners, masters, and underwriters who make use of the warranty, and who regulate their contracts and navigate their ships with reference to it, to determine its meaning.

"1. It is in my opinion a material consideration that the river or estuary of St Lawrence, and the Gulf of that name, are in a geographical sense very closely connected. A glance at the map of the east coast of America will make this more clear than any description. I may, however, point out that the Gulf of St Lawrence is almost completely landlocked by the islands of Newfoundland and Cape Breton, being approached from the Atlantic by three passages—the Straits of Belleisle, the Middle Strait, and the Gut of Canso. It is in evidence that these passages are used at different seasons of the year by vessels bound for Montreal. Thus the Gulf of St Lawrence is traversed in every direction by traders to and from the great Canadian river, the traffic to ports in the Gulf being inconsiderable in comparison with the traffic passing through the Gulf to the river St Lawrence. The witnesses are not agreed as to what should be considered the seaward limit of the river, and it is not easy to determine at what part of the voyage the river ends and the waters of the Gulf are entered. Above the island of Anticosti it is considered river, although the distance between the shores exceeds a degree of latitude. On either side of that island and below it the estuary expands into the Gulf of St Lawrence in a way that suggests that the whole should be regarded as one arm of the sea. The application of the same name to the river and the Gulf indicates, and as I think correctly indicates, the geographical identity of the basin of the river and Gulf.

"2. The considerations to which I shall next advert are those which have relation to the clause of warranty, and the reason for its insertion in policies of insurance. The warranty in question was introduced about twenty years ago, about the time when time policies came into general use in the American trade. It is explained that when time policies are effected at rates representing an ordinary risk, it has been usual to exclude the navigation of the St Lawrence waters during six months of the year, because the ordinary rates of insurance would not cover the special risks incident to the navigation of these waters in the winter season. In the present case, for example, the 'Chipman' was insured at ten guineas per cent., being the ordinary annual rate for a first-class vessel; but there is evidence that twenty guineas would not be considered too high a premium for a winter voyage to the river or Gulf of St Lawrence.

"It was suggested for the pursuers that the risks intended to be avoided by the warranty are confined to the river St Lawrence. The evidence points very strongly to a different conclusion. Except for a few weeks at the beginning and end of the excepted period, the river is entirely frozen, and is therefore not navigable at all. No doubt, during the early and later weeks of the winter season the navigation of the river is in a sense possible, although extremely dangerous in consequence of the masses of floating ice which are carried down by the current. But the navigation of the Gulf is also very dangerous during the whole of the excepted period. This is admitted with perfect candour by all the witnesses examined for the pursuers to prove their construction of the warranty. For example, Mr W. B. Grieve, shipowner and merchant, St John's, says:—'The percentage of vessels lost in the Gulf is very high, and during the prescribed period it is shunned by underwriters.' Mr Thorburn, a witness also of large experience, when questioned as to the dangerous character of the shores of the Gulf in the winter months, makes answer—'I

believe they are regarded as dangerous by underwriters, but much more on the Canadian side.' Mr Cooper, insurance-broker at Lloyds', says:—'I should say the dangers in the river and the Gulf, which the warranty is required to guard against, are about the same.' Mr Dale, a Liverpool underwriter, says:—'The Gulf of St Lawrence in winter is not an ordinary risk. We get a very enhanced premium for it. . . . . I am not aware whether or not fogs and snow-storms are more frequent in the Gulf or in the river.' Mr Evans, manager for a Liverpool firm, says:—'We do not think there is sufficient inducement to send our ships there at that season. In fact, freights in that trade have been very low in the last few years, and the winter risks in the Gulf are very great.' Mr Pollexfen, a Liverpool shipowner, holds that the river is more dangerous than the Gulf in winter, but adds—'The Gulf is more dangerous in the spring than the river is in November and December.' Of four witnesses for the pursuer examined in Court, three—Grieve, M'Intyre, and Thorburn—gave evidence to the same effect:—'I know that navigation in the Gulf of St Lawrence is dangerous in winter from snow-storms, not from fogs' (Grieve). 'The Gulf of St Lawrence is dangerous on account of fogs and snow and ice in winter making the navigation more risky' (M'Intyre). 'I believe part of the Gulf freezes . . . . I should say that in winter the Gulf is a hazardous place to navigate' (Thorburn).

"While such is the character of the pursuers' evidence on the subject of risk, that of the defenders is really overwhelming. I shall only quote the statement of Captain Lees, for many years a chief officer in the Allan and Anchor lines of steamers—a gentleman who has seen more of the Gulf in winter than any of the other witnesses, because, as he explains, the vessels in which he served carried the mails, and were among the last to leave Montreal. He states—'In winter there is no navigation in the Gulf; it is closed by ice. The navigation of the Gulf is dangerous at any time. In winter the snow covers the land, and completely changes its appearance, filling up the valleys and obliterating the landmarks . . . . The polar ice usually comes in by Belleisle and drifts down with the current . . . . Even the fastest steamer tries to get out of the Gulf by 1st December. The lighthouses are put out all winter and re-lighted on 1st April.' Other witnesses speak to the extinction of lighthouses in winter, except those at Cape Ray and the Straits of Belleisle, which are considered to be Atlantic lights. If the Gulf were considered navigable, though dangerous, it would be very necessary that it should be lighted in winter. The extinction of the lights is therefore a proof that the navigation of the Gulf is considered to be closed during at least four of the six excepted months of the policy.

"I shall conclude my analysis of the indirect evidence by observing that while the words of the warranty are sufficient to cover the Gulf and river, and while the Gulf and the river are geographically or hydrographically continuous, and are traversed in succession by the greater part of the vessels engaged in the Canadian trade, all the reasons which would induce an underwriter to stipulate for the exclusion of the more hazardous risks in a time policy at ordinary rates of premium appear to me to apply as much to the Gulf as to the river. Of course the dangers incident to the navigation of the river and the Gulf are not precisely the same. The river is more affected by ice and the Gulf by storms. But from the point of view of an underwriter, the risks are substantially the same, and are due to the same causes. All the witnesses are agreed that a winter voyage to the Gulf would not be insured against except at a very high premium. As regards time policies, a warranty 'No river St Lawrence' would not protect the underwriter against the whole of the special risks which he is entitled to except when he insures at the ordinary rates; and the indirect evidence is all strongly opposed to the pursuers' theory that by 'No St Lawrence' they only warranted the ship not to enter the river St Lawrence within the winter months.

"3. I do not propose to refer in detail to the direct evidence as to the meaning attributed by insurance-brokers and shipowners to the words in the warranty. Their impressions as to the meaning of the words are to my mind much less valuable than the reasons which they assign for the insertion of the clause. I have, however, carefully read and considered this part of the evidence, especially that of the witnesses from London, Liverpool, and the Clyde. I think the body of evidence in favour of the more extended construction is superior in weight and consistency to that on the other side. I must observe also that while the pursuers' witnesses are very decided in the expression of their opinion that the warranty means 'No river St Lawrence,' they all, or almost all, base that opinion on the apprehension that the clause was intended to except the special dangers of the river in winter. Now, if my estimate of the indirect evidence be well founded, this reason is a complete *non sequitur*. The dangers of navigation in the winter season are by no means confined to the river. During a great part of the winter the river is completely frozen, and where navigation is impossible there can be no dangers of navigation to be avoided. The Gulf is always open, and its navigation in winter is very dangerous. If the meaning of the clause is to be collected from a consideration of the risks intended to be covered, and the risks not intended to be covered or insured against, I can have little doubt that it was not the intention of the parties who negotiated the policy that the premium paid—the ordinary premium of ten guineas per annum—should cover the special risks incident to winter navigation in the river or the Gulf of St Lawrence.

"I need hardly add that although the 'Chipman' was not lost in the Gulf, but in the open Atlantic, this makes no difference in the question of liability. Having incurred a risk which her owners warranted that she should not undertake, she is in law not insured. The underwriters are freed from their obligation, or, to speak with strict accuracy, are held never to have undertaken any obligation to indemnify the owners against sea risks."

The pursuers reclaimed, and argued—The warranty in question is unusual and ambiguous. Now, the rule of law as applicable to such a case is that insurance companies having the framing of their contracts in their own hands must make them so clear and unambiguous that there shall be a

consensus between the parties to the contract as to what it exactly means; if they fail to do this, then the contract will be construed strictly *contra proferentes* and in favour of the insured. Now, how was this ambiguous contract explained by the evidence? While a body of evidence was brought to show that many people understood the words "No St Lawrence" to apply to the Gulf and the River, there was also a strong body of evidence to show that just as many people understood the words to apply only to the river. The underwriters, then, had failed to establish the *consensus* in the parties to the policy required by the law, and therefore the warranty fell to be construed against them.

Authorities—Arnold on Marine Insurance, vol. i. 5th ed. p. 296; *Carr & Josling* v. *The Royal Exchange Insurance Company*, Nov. 20, 1863, 33 L.J., Q.B. 63; *Fitton* v. *The Accidental Death Insurance Company*, June 18, 1864, 34 L.J., C.P. 28; *Life Association of Scotland* v. *Foster*, Jan. 31, 1873, 11 Macph. 351.

The defenders replied—(1) The natural and obvious meaning of the expression "No St Lawrence" is an exclusion from all the waters known as St Lawrence, *i.e.*, the river as well as the Gulf. It was a term really needing no proof to explain it, for whatever was outside its meaning (it meant both Gulf and river) was clearly "St Lawrence." But (2), assuming that the expression is ambiguous, it is thoroughly cleared up by the evidence given by the Glasgow underwriters, which was all in defenders' favour, and was of special value, inasmuch as Glasgow was the *locus contractus* (*vide Cook* v. *Greenock Marine Insurance Co.*, July 18, 1843, 5 D. 1379). These witnesses were all of opinion that the Gulf as well as the river fell within the warranty.

At advising—

Lord Justice-Clerk—The policy which is the foundation of the pursuers' claim was effected on a vessel called the "L. de V. Chipman," and was a time policy, beginning on the 29th May 1878 and ending on the 28th May 1879. I do not need to read the terms of the policy itself, but on the margin of it there were written these words—"Warranted no St Lawrence between 1st October and 1st April."

The vessel sailed from Cardiff under this policy to Prince Edward's Island, which is situated within the Gulf of St Lawrence, and on her voyage home she was wrecked through perils of the sea, a considerable time after she had left Prince Edward's Island and the Gulf of St Lawrence, and the vessel being totally wrecked a claim is now made by the policy-holders against the underwriters for the amount assured. The answer is that these words "Warranted no St Lawrence between the 1st October and 1st April" amount to a warranty that the vessel shall not be either in the river St Lawrence or in the Gulf of St Lawrence within the conditioned time; and that as the vessel was in the Gulf of St Lawrence in the conditioned time the policy from that time forward became entirely void.

If that be a true statement of the nature of the risk undertaken, and the terms on which it was undertaken, there can be no question that the policy was voided, because a warranty in a policy must be strictly complied with, and if it is not strictly complied with the whole contract falls. I think that is the law which has now been completely established. It is contended on the other hand that it is of the nature of a penal clause, and the contract of indemnity has to fall altogether if that penal clause be not observed, and that therefore it is a duty of the underwriter to the insured to make it quite clear what the terms of the warranty mean and express, seeing that it is the provision for which they stipulate as the counterpart of their obligations under the policy.

And now the question is, What is the meaning of this warranty? As I have said, the underwriters say that those words "No St Lawrence" signify that the assured warrants that the ship will not be in the river St Lawrence or in the Gulf of St Lawrence during the time conditioned in the policy. On the other hand, the holders of the policy maintain that the warranty only applies to the river St Lawrence, and does not include the Gulf of St Lawrence, and that the words will not bear that interpretation.

On the mere words, they are not by themselves capable of intelligent construction. They may imply or indicate an obligation, but they do not express one. From their negative nature, and the subject of the policy, it may be surmised, that they import a prohibition of some kind, but what its limits or conditions may be they do not enable us to discover without antecedent information.

Prima facie, therefore, the underwriters are responsible for not using plain and intelligent language to express the simplest of meanings. The words are plainly elliptical, imperfect, and inaccurate, especially if they were meant to include the Gulf of St Lawrence. Nothing could have been easier than to have used words for the purpose which admitted of no doubt if it was intended that all who read should understand them. Had I been to construe them as they stand, and to assume that they imply what they do not express—an obligation by the assured not to navigate certain waters—I should have inferred that the river St Lawrence was alone the subject of the warranty, St Lawrence being the proper and distinctive name of a river only, and the Gulf or estuary of that river being only so described as a derivative or accessory. It is not the Gulf of St Lawrence; that is a description of it. St Lawrence is the proper name of the river alone, and the estuary of the river is called the Gulf of St Lawrence because it is the Gulf of the river St Lawrence; and the word St Lawrence by itself would not to my mind convey any idea connected with the Gulf, and would convey only ideas connected with the river, just as Genoa or Venice used by themselves would not suggest the idea of the arms of the sea which take their appellation or rather description from their proximity to the cities to which these names belong.

But, no doubt, this elliptical term is used as a technical expression of commerce. Ambiguous to us, the meaning may be quite clear to merchants, who are agreed about the thing signified, and the words to be used to express it. In other words, by general consent and understanding in the mercantile world these words may have been used to express a warranty that the vessel insured will not within the conditioned period navigate

the waters either of the Gulf or river St Lawrence. It does not admit of doubt that by proof of general consent and understanding they may be so construed, and that proof of course must be parole, as in no other way can the alleged usage or common consent among merchants be established. Thus, Lord Ellenborough allowed parties to prove by parole that the Gulf of Finland was understood among merchants to be included in the term "Baltic;" and in another often cited case the island of Mauritius was held to be comprehended under the term "Indian Islands," although it is in close proximity to the African coast. On the other hand, such evidence will only avail when the usage alleged is general and notorious, and to use the words of Mr Arnold—"The usage of a particular place, or of a particular class of persons, cannot be binding on non-residents or on other persons unless they are shown to have been cognisant of it" (p. 284). What, then, is the import of the evidence adduced? The statement of the defenders here is the following—"The defenders maintain that the terms of the said warranty are distinct and unambiguous, but in the event of its being held competent to interpret them by proof of a custom or understanding of trade, the defenders aver that the construction above set forth is the true construction of the said clause, according to the custom and understanding of underwriters and shipowners, and at all events according to the custom and understanding of underwriters and shipowners in Glasgow, where the policy in question was entered into."

Now, as regards the first of these propositions, I think the defenders have failed to prove it; they have failed to prove that it is the general understanding of underwriters and shipowners in this country that these words have the meaning that they attach to it. On the contrary, there is a large amount of evidence from traders and persons conversant with marine insurance that the terms in question would not in their judgment or experience carry the meaning contended for; that they are in no sense technical expressions, understood to bear a specific and acknowledged meaning among traders; and many of the witnesses, on the contrary, say that they would read them as confined to the river. There is a large and weighty body of evidence, indeed, that cannot be questioned to this effect, although, on the other hand, there are men of experience and weight who are of a contrary opinion, and specially members of the Glasgow Underwriters Room.

Between these conflicting opinions I cannot affirm that the underwriters have established a general and notorious usage among mercantile men assigning to these words the meaning contended for. It would certainly have weighed strongly with me—and this is the ground on which the Lord Ordinary lays the greatest stress—in determining the balance, if I had found that the same reasons which led to the exclusion of the river would necessarily have led to the exclusion of the Gulf also. But this is not so. This exclusion is all of recent date, and took its rise from 15 to 20 years ago, in the grain trade with Montreal and Quebec—that is to say, within the limits of the river St Lawrence this trade was found so hazardous in the months of November, December, and January that the river came first to be excluded during the winter, afterwards the Gulf also, which although not so dangerous was yet perilous, as indeed all navigation in those seas must necessarily be; but as one of the witnesses said, "It is all a question of premium."

I do not go further into the evidence on this matter, but it is impossible to disguise that the exclusion of the river as a separate matter rested upon grounds much stronger than the exclusion of the Gulf. Trading to Prince Edward's Island was a different matter from trading to Montreal and Quebec, and we have it proved that in the month of October there are reasons for trading to Prince Edward's Island which do not apply to any other season. There are commodities to be had at that time which are not to be had at any other time at Prince Edward's Island, and although I do not in the least disguise that the weight of evidence relied on by the Lord Ordinary is very considerable, I do not think it amounts to this, that there was no necessity—no substantial necessity—for excluding the Gulf if the river St Lawrence was also excluded. I think the evidence, on the whole, leads to a contrary conclusion, and there are instances—not a great many, but still instances—of the river being specially excluded while the Gulf was not. Therefore I do not think we derive much light from the alleged history of this exclusion, which is admittedly recent.

I think, however, that this is not enough on the authorities without some evidence that the assured so understood the words of the warranty. It is said that M'Intyre, the agent who effected the insurance, was a Glasgow broker, and must have known what the underwriters in conformity with their invariable practice meant by the words. Is is also said that as Glasgow was the *locus contractus* the usage there must construe the contract. M'Intyre, however, swears that he was ignorant of the usage, and that he understood the words of the warranty to apply to the river only. I cannot say that I have found this part of the case unattended with difficulty, but if, as I rather gather from cases in England, the local usage of one body of men, especially when the usage is only recent, will not bind the other party to the contract in the construction of unusual or imperfect expressions in the policy unless it be shown that he so understood or was bound to understand these expressions, I am of opinion that this understanding has not been established here. Neither do I think that the principle of *locus contractus* can apply to such a case. It is only applicable when the law of the *locus contractus* is indispensable, and if a recent local practice is insufficient of itself to constitute law, or to presume knowledge or consent on the part of the other contracting party, I am of opinion that the principle cannot aid the defenders.

Lord Young—I entirely concur in your Lordship's judgment—indeed in every word of it—and I have really very little to add. The defence to the action is a breach of warranty, and the warranty said to have been broken is this—"Warranted no St Lawrence between 1st October and 1st April." Now, as your Lordship has observed, a warranty thus expressed is unintelligible without evidence. The law of Scotland does not enable us to say what is meant by the phrase "Warranted no St Lawrence." We must have recourse to evidence with respect to a great

many such brief expressions in policies of insurance and other mercantile writings, although *ex facie* they should not need to be proved, but should be readily intelligible to one who has seen them for the first time. But they have come to have a meaning stamped upon them by custom, and custom recognised by ports; and whenever that is the case the law applies that meaning that has been stamped upon them by custom and recognised by traders. There are innumerable instances of such expressions on which usage has stamped a meaning; these are frequently recognised in Courts of law; and in some cases the Court will give effect to them without any evidence at all, although evidence might be necessary. But this expression in question is not intelligible in itself; and it has not had any meaning stamped upon it by any usage known to the Court, and recognised and confirmed and acted upon in previous judicial decisions. We must therefore have recourse to evidence; and that is quite legitimate with respect to such an expression in such a document.

But then the evidence is conflicting, and out of the conflicting evidence as to the meaning of an obscure expression you cannot readily get a *consensus* of both parties in one meaning. The underwriters say that they understood it to mean an exclusion from not only the river St Lawrence but also the Gulf of St Lawrence. I think the evidence brings it to this, however, that the St Lawrence here referred to is the St Lawrence in America, the river or Gulf or both. The underwriters say that they understood the term "St Lawrence" in this warranty—a term which is not a common one but a proper name—to mean both river and Gulf. Wherever you have a proper name as distinguished from a common term, evidence is always legitimate to explain to the Court what that proper name applies to. Now, the proper name St Lawrence, upon which the ambiguity turns, applies to a river and to a gulf. It may apply to other meanings; but I think the evidence shows us this, that one or other or both of these was in the meaning of the parties when they used it in this instrument. The underwriters say they used it as applying to both the river and the Gulf. The insured upon the other hand say that they understood it to mean the river; and they sent their ships at once into the Gulf, which would have been a breach of the warranty on the construction put upon the term by the underwriters. And the evidence, as I have said, is conflicting. A number of witnesses say that they would have understood it, and did in point of fact understand it, in such an instrument as this, to apply to the river only and not to the Gulf; and about a similar number say that they would have understood it, and did in point of fact understand it, to apply to both. Now, here is an ambiguity not cleared up by evidence as to the particular geographical place to which the proper name St Lawrence applies as here used. I cannot infer from that a *consensus* which will make this a warranty for breach of which this policy should be forfeited. I think it is extremely probable—indeed I would like to say that it is my belief—that the underwriters intended it to apply both to the river and to the Gulf. But then, on the other hand, the insured, I think, did not understand it to apply to the Gulf, and they accordingly sent their ship to the Gulf just at once, and they have adduced a number of witnesses to say that they have done the same thing repeatedly. But the matter is solved by the maxim for interpreting the words used in cases of such ambiguity *contra proferentem;* and I think the underwriters are the *proferentes* with regard to a policy of insurance, and that they have themselves to blame for not making that clear which in an instrument they themselves framed they could have made clear, and which they are attempting to make clear now. It will be observed that they are here pleading the warranty and a breach of it upon this ambiguous language, not because the alleged breach of warranty had anything to do with the risk or the loss, which it had not, but simply upon the hard stern rule of law—as totally unconnected with loss as it may be—and in this case it certainly is—that if the warranty is not exactly fulfilled by the insured, the obligation of the underwriters shall be forfeited. Now, I am not sorry that they are foiled in this, and the only blame, or rather the consequence of the blame, of using this ambiguous language is that they are not enabled to plead a breach of warranty totally unconnected with the loss in order to free them of the obligation which that warranty would not make more severe or at all tend to bring down upon them. On the whole matter, and making these, I must admit, superfluous observations, I entirely concur in your Lordship's judgment, and in the conclusion to which it leads.

Lord Craighill—The pursuers here sue for the sum insured by a time policy on their vessel the "Chipman" by the defenders. There is in the policy a warranty "No St Lawrence" between 1st October and 1st April. The vessel insured was lost within the year covered by the policy, not in the river or Gulf of St Lawrence; but it appears that between the 1st of October and the 1st April she was within the Gulf, and on this, as a breach of the warranty, the defenders defend themselves against the imputed liability. The Lord Ordinary has sustained this plea, and hence the reclaiming-note for the pursuers.

The question is, What is the meaning of the warranty "No St Lawrence?" Now, if the words as used in the policy have a technical or trade meaning in general use, parties must be presumed to have used the words in that acceptation, but if there is no technical or trade meaning by which their import is determined, the warranty must be construed by the Court, unless there is an ambiguity, in which case that meaning which restricts the comprehension of the warranty in the policy will be adopted, according to the rule observed in similar circumstances.

Proof has been led, but it does not appear to me that the words "No St Lawrence" have a trade meaning. There is no custom which affords an interpretation. There is, however, another thing for which the proof led may be used, and that is to show that there are waters known as the river, and there are waters known as the Gulf of St Lawrence, the navigation of both being in the winter season exceptionally dangerous. It is said that a variance of opinion among the witnesses who have been examined on the subject proves an ambiguity. But this is a view of the matter which, as I think, cannot be

adopted. Were we to be influenced by it we practically would be making the witnesses co-ordinate with ourselves in the interpretation of the contract. Knowing, then, that there is a river and that there is a gulf, is the warranty plain or is it ambiguous? My opinion is that the meaning of the warranty is plain. If there had been only a river, or if there had been only a gulf, there could have been no ambiguity; and although there is a river and there is a gulf the warranty is as plain as it would have been in the case which I have supposed—"No St Lawrence," from the comprehension of the negative, meaning, according to the natural import of the words, neither river nor gulf."

The Lord Ordinary has entered at length upon a review of the proof, and the various considerations by which he has been led to the judgment he has pronounced. I agree with him in the result, and in the reasons he has given for his judgment, and therefore think it necessary only to add that I think his interlocutor ought to be affirmed.

Lord Rutherfurd Clark—I have felt very considerable difficulty in this case. I am satisfied, however, that the words "No St Lawrence" have no technical meaning or trade meaning; and that being so, and as your Lordships look upon the phrase as an ambiguous phrase, I am, on the whole, disposed to hold that the words must be construed strictly against the insurer, and to concur in the judgment which your Lordship has proposed.

The Court recalled the Lord Ordinary's interlocutor, and decerned against the defenders in terms of the conclusions of the summons.

Counsel for Pursuers—Trayner—M'Kechnie. Agents—Archibald & Cuningham, W.S.

Counsel for Defenders — Solicitor-General (Asher, Q.C.)—Jameson. Agents—J. & J. Ross, W.S.

Friday, February 9.

FIRST DIVISION.

[Lord M'Laren, Ordinary.

SNODY'S TRUSTEES *v.* MILLAR AND OTHERS.

Succession—Legitim.

By his trust-settlement a testator directed his trustees to divide the residue of his estate into three equal portions. One portion was to be paid to the issue of a daughter who had predeceased him, another to another daughter who had survived him, whom failing to her children equally among them, and the remaining one-third, from which was to be deducted certain advances made during the testator's life (which advances were to be reckoned into the general amount of the residue before making the division), was to be held by the trustees for the only remaining daughter, a widow, who also survived him, in liferent allenarly, the capital to be paid after her death in certain proportions to her two children; the right of those children to these sums was declared to vest at the testator's death. The deed provided that the provisions in favour of the testator's "daughters and grandchildren" should be in full implement of any obligations he might have come under by other deeds, and also of all legitim and other claims competent in any manner of way. The last-mentioned daughter renounced the provisions of the settlement and took her legal rights. *Held* (following *Fisher* v. *Dixon*, 6 W. & S. 431, from which the case was held indistinguishable) that the children of the daughter who took her legitim had a separate and independent right under the settlement which was not affected by their mother's election to take legitim.

Mr Andrew Snody, S.S.C., died on 18th March 1881. He was predeceased by his only son John Morison Snody, and by one of his daughters Isabella Snody or Mrs Wallace, who was survived by her husband and three sons. Mr Snody had two other daughters who survived him. One of them married a Mr Gibson and had issue, who, as well as their parents, survived Mr Snody. The other became Mrs Millar; at the date of Mr Snody's death she was a widow with two children, a son and daughter. For some time before his death Mr and Mrs Gibson and their children resided with him. By his trust-disposition and settlement, dated 8th October 1880, and recorded 9th May 1881, Mr Snody assigned and conveyed to the persons therein named, as trustees for the ends and purposes mentioned in the deed, his whole estates, heritable and moveable. The trust purposes were (1) payment of debts; (2) a special provision to Mrs Gibson of the household furniture, books, and silver plate. In the third place, the trustees were directed to sell the heritable property of the deceased, and to divide the whole residue of the estate (including certain sums advanced to Mrs Millar amounting to about £1800, and sums advanced to one of the children of Mrs Wallace) into three equal parts, one of which parts, under deduction of the £1800 just mentioned, was to be held by them for the liferent behoof of Mrs Millar, and at her death was to be divided by them as follows:—"They shall pay the sum of £1000 to her daughter Helen Lewins Millar, and her heirs and assignees whomsoever, and they shall pay the remainder to her son William Somerville Millar, and his heirs and assignees whomsoever, the legacies to my grandchildren being intended to vest at my death." The second share of the residue was to be divided among the children of Mrs Wallace, the truster's predeceasing daughter, in certain proportions mentioned in the deed. The remaining share was to be paid over by the trustees to the truster's daughter Mrs Gibson, already referred to, whom failing to her children equally, and the survivors and survivor of them, share and share alike. The deed further went on to declare "that the provisions in favour of my daughters and grandchildren hereinbefore written shall be accepted by them in full implement of any sums of money which I may have undertaken to pay to any of my daughters or their issue under their contracts of marriage or otherwise, and also in full satisfaction to them of all legitim, bairns' part of gear, or other claim competent to them on my death in any manner of way."